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In the Supreme Court of the United States

OCTOBER TERM, 1972

LEE W. MERRICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JULIUS LUCIUS ECHELES
CAROLYN JAFFE
CONSTANTINE XINOS
35 E. Wacker Drive
Chicago, Illinois 60601
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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LEE W. MERRICK,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Lee W. Merrick, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this cause on July 19, 1972.

Opinion below

The opinion of the Court of Appeals, not yet reported, is reprinted as Appendix A, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on July 19, 1972. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Sec. 1254(1).

Questions presented

1. Whether the delay between the commission of the alleged offenses in 1963 and 1964 and the trial in 1971 deprived defendant of his Sixth Amendment right to a speedy trial and his Fifth Amendment right to due process of law, where the investigation of defendant's tax returns was referred to the Intelligence Division of the Internal Revenue Service in 1963, a complaint was filed April 11, 1969, an indictment returned on December 4, 1969, was dismissed for technical reasons, and the indictment upon which defendant was convicted was returned October 6, 1970; further, whether defendant's constitutional speedy trial and due process rights were violated by such delay in the light of events which unfolded at trial, demonstrating that defendant was prejudiced by the delay, including unavailability of certain business records due to their destruction in 1968, unavailability due to death of two potential defense witnesses prior to trial, and dimmed memories of many witnesses, all occasioned by, and causing prejudice to defendant by, the delay in bringing defendant to trial.

2. Whether defendant's Fourth, Fifth and Sixth Amendment rights were violated by the derivative use of defendant's statements and physical evidence given to Internal Revenue Service Agents by defendant and his accountants, where defendant had not been properly advised of his rights as required by *Miranda* v. *Arizona*, 384 U.S. 694, as to the 1963 offense, and had not been advised of those rights at all as to the 1964 offense.

3. Whether in a criminal tax prosecution, the jury should be advised that one who signs a tax return in blank is held responsible for its contents and held knowledgeable thereof, where he has entrusted its preparation to one qualified to prepare federal tax returns for others, only if the evidence establishes that he did in fact know the contents of the return, or that he knowingly withheld from the preparer any available data as to his taxable income and expenses, or knowingly provided him with incorrect data; and whether it is error to instruct the jury, without further explanation, that they may infer that one who signed his tax return had knowledge of its contents. It appears that the Circuits are not in complete accord as to this issue. Compare *Wainwright* v. *United States,* 413 F. 2d 796 and 448 F.2d 984 (10 Cir.), with *United States* v. *Bass,* 425 F.2d 161 (7 Cir.).

4. Whether the rule followed by the Tenth Circuit, that circumstantial evidence need not exclude every reasonable hypothesis other than that of guilt, may continue to stand in the light of *In re Winship,* 397 U.S. 358, requiring proof of guilt beyond a reasonable doubt as a facet of due process; and whether defendant's due process right to a fair trial was violated by application of that rule by the trial and appellate courts.

5. Whether in a criminal tax prosecution, the jury should be advised that, whatever the outcome of the criminal case, the government has recourse to a civil action to collect unpaid taxes, interest and penalties, where various courts in the federal system are in disagreement as to whether such an instruction should be given. Compare the instant case with *United States* v. *Rossi,* 66-2 U.S.T.C., 9649, 18 AFTR 2d 5296 (W.D.N.Y.).

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment IV, provides in pertinent part:

> "The right of the people to be secure in their . . . papers, and effects, against unreasonable . . . seizures, shall not be violated. . . ."

United States Constitution, Amendment V, provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Amendment VI, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial and to have the Assistance of Counsel for his defense."

Title 26, United States Code, Sec. 7201, provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Statement of the Case

Petitioner Lee Merrick (hereafter called defendant) was found guilty by a jury of having willfully and knowingly attempted to evade and defeat federal income tax for 1963 (Count II) and 1964 (Count IV), in violation of Title 26, U.S. Code, Sec. 7201. Three other counts of the

original five-count indictment had been dismissed. Defendant was sentenced to one year on Count II and 18 months on Count IV, sentences to run concurrently. On appeal, the judgments were affirmed.

During 1962, 1963, and 1964, defendant owned and operated a meat by-products business in Colorado, under two business names (II: 41-42),[1] and including two subsidiaries, one of which was sold to Don Kane in 1964. (VII: 617; VIII: 274) During the same years, defendant engaged in a similar business in partnership form, operating two companies in Kentucky. (II: 126-37)

Defendant was absent from the Colorado businesses 75% to 90% of the time, leaving the maintenance of his business records to Mrs. Virginia Woertendyke, under the supervision of CPA Ernest L. Hanks. (II: 89-91) Mrs. Woertendyke was deceased at the time of trial. (VIII: 207) The daily records of receipt and expenditure were maintained by Mrs. Woertendyke and delivered to Hanks monthly for entry into the company accounting records. (II: 90)

The operational supervision of the Colorado plants was under defendant, Don Kane, and Glen Wilson (IV: 367-69, 388), until April 3, 1964, when Don Kane became exclusively engaged in his own plant. (VII: 619-20)

Preparation of Tax Returns

The records of daily receipts maintained by Mrs. Woertendyke (Pl. Ex. 51, IX: 344-67) were picked up monthly and delivered to Hanks (II: 60), who then transferred the daily income totals to the ledgers maintained in his office. (II: 89)

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[1] Record references are cited to volume (Roman numeral) and page (Arabic numeral).

At the end of the year he would prepare a work sheet and meet with defendant to discuss preparation of the Colorado income tax return. (II: 91-92) The discussion related principally to the tax treatment of company expenditures, such as capitalization and depreciation or expensing of company property, and to personal deductions. (II: 94) The amount of sales income as stated on the yearly accumulative totals shown on his work papers was adopted by Hanks without consultation with defendant. (II: 94-95)

Using the totals for income derived from his own bookkeeping records and other accumulated data, Hanks prepared defendant's Colorado income tax return and forwarded a copy of it to Joseph T. Woolridge, defendant's accountant in Kentucky. (II: 95-96)

Woolridge prepared defendant's federal tax return from the information obtained from Hanks and from partnership returns prepared by him for the Kentucky operations. (II: 131-33) Defendant would call at his office in Kentucky and sign the federal tax returns in blank prior to Woolridge's receipt of information from Hanks and prior to his completion of the returns. (II: 129-30) For defendant's Colorado business income figures, Woolridge relied solely on the Colorado return prepared by Hanks. (II: 133)

Specific Items of Unreported Income

In its Bill of Particulars, the government stated that its case would be based upon specific items of income alleged to have been received by defendant from Laurents Packing Co. and omitted from his tax returns for the years in question.[2] (VIII: 143-47)

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[2] Attached to the Bill of Particulars were lists of checks, showing specific checks by date, number, payee, and amount. (VIII: 145-47) Six checks totalling over $21,000 for 1963, and sixteen checks totalling over $83,000 for 1964, were admitted into evidence. (III: 276-77; VIII: 146-47)

The trial court concluded that John Shinn, Laurents' manager, could not pick out any check and say he knew of the direct delivery of the proceeds to defendant.[3] (III: 282)

Lynn Meyers, Laurents' bookkeeper, on one occasion went to the bank with defendant, cashed a check, and returned the proceeds over to him. (III: 228-29) Meyers could not identify the check, and did not know its date or amount.[4] (III: 245; IV: 342-43)

Other evidence was introduced dealing with the sale of meat to other purchasers whose transactions were shown on daily sales receipts records. (III: 177-205; Pl. Ex. 5; IX: 344-67) The government attempted to establish that since certain sales were listed in the records and the alleged transactions with Laurents were omitted, defendant had failed to report income.

Any and all evidence concerning receipt of the specific items of income from Laurents by defendant was entirely circumstantial. There was no direct evidence of receipt

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[3] John Shinn, Laurents' manager, met defendant in 1963 and discussed the purchase of frozen meat. (III: 257) Checks drawn to Columbine Boneless Beef Co., Thrifty Meat, and "Cash" were taken to the bank by himself or Lynn Meyers and cashed. (III: 265) The proceeds were then delivered either to Don Kane, Garth Merrick, or defendant. (III: 263, 266) Shinn did not know of any particular check, the proceeds of which were delivered to defendant personally. (III: 281-82) Shinn testified that "on occasion" the proceeds of the checks were delivered to defendant (III: 281-82), but could not specify any occasion or how much cash was involved. (III: 281-82) He was not even certain whether any such "occasion" arose during any of the prosecution years.

[4] On all other occasions where money was paid for meat purchases, the money was paid to Garth Merrick or Don Kane. (III: 230, 245)

by him at any specific time of any specific Laurents Packing Co. check or of the proceeds thereof. Defendant's motion for acquittal at the close of the government's case and at the close of all the evidence was denied. (IV: 568-70; VII: 611)

Delayed Prosecution

A timely motion to dismiss the indictment because of delayed prosecution was filed by defendant, stating that certain business records of Laurents Packing Co. were essential to the defense for use as contradicting or impeaching evidence; that Laurents had been placed in receivership in May, 1967, closed operations in July, 1969, and its records were unavailable; that the events referred to in the indictment occurred 6 to 8 years earlier; and that prosecution should have been instituted timely, or the government should have preserved the records. (VIII: 23-24)

At a hearing before Judge Arraj, not the trial judge, on November 25, 1970, defense counsel advised the court that he was attempting to obtain the missing records or to cure the prejudice caused by their unavailability through the expected testimony of an accountant. (Supp. I: 8-11) Defense counsel could not, at this hearing, unequivocally state that the missing records could not be located, nor could he state that their absence could not be offset by other evidence. The government contended that prejudice had not been shown as of November 25, 1970. (Supp. 1: 25) The court took the motion under advisement.

On December 11, 1970, defense counsel advised the court by affidavit and correspondence that the books and records of the Laurents Packing Co. had been destroyed, and that the prejudice to defendant could not be cured. (VIII: 86-88) Counsel advised the court by affidavit of the large volume of Laurents' purchases for the years in question (VIII: 95, 101, 106), and asked for sufficient time to produce witnesses

if the court desired additional evidence on the motion. (VIII: 87)

In January, 1971, Judge Arraj denied the motion without further evidence or argument. (VIII: 85)

On March 16, 1971, the government stipulated to the testimony of a Laurents' accountant, corroborating that the records had been destroyed (VIII: 184-206), and further stipulated that two witnesses, a Mr. Reuter and Mrs. Woertendyke, defendant's bookkeeper, were deceased. (VIII: 207).

At the time of trial, on March 22, 1971, defendant filed a "Renewed Motion to Dismiss for Delayed Prosecution."[5] (VIII: 213-17)

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[5] The motion stated that defendant's rights under the Fifth and Sixth Amendments were violated, and that those amendments, as well as Rule 48(b) of the Federal Rules of Criminal Procedure, required dismissal of the indictment; that the defense could not show that Laurents did or did not have transactions similar to those claimed by the government to have taken place with defendant; that evidence of similar transactions by Laurents was necessary to test the credibility, competency, memory and reliability of the government witnesses as well as to introduce evidence that the specific checks listed by the government were in fact transactions involving some person other than defendant; that the missing records were necessary to lay a proper foundation to establish reasonable doubt as to whether defendant received the proceeds of the checks; and that the death of defendant's bookkeeper denied the defense pre-trial assistance and trial testimony regarding instructions given to her by defendant, the degree and amount of supervision and involvement of defendant in the bookkeeping operations, and whether defendant paid close attention to the business affairs of his companies or instead delegated those responsibilities. The motion urged that it could be reconsidered before a second judge of the same court in the same proceedings. (VIII: 213-17)

Judge Chilson, the trial judge, did not allow argument, nor did he allow evidence to be taken regarding this motion. He permitted it to be filed and reserved ruling (II: 3) until the jury had returned its verdict. (V: 528-29; VI: 606-07; VII: 611)

At the hearing on the post-trial motions, April 23, 1971 (Supp. II), the court denied the motion. (Supp. II: 8) The sole reason for denial of the motion was not on the merits, but rather was that the motion had been heard previously by another judge. (Supp. II: 9-10) The court apparently did not realize that the renewed motion raised issues which had not been decided earlier on the merits.

Motion to Suppress

On September 4, 1964, defendant was informed that his 1962 return had been selected for examination. On Sept. 8, 1964, he was interviewed by Revenue Agent Charles E. Green, Jr. On April 25, 1964, Green referred the investigation to the Intelligence Division, Internal Revenue Service. On December 10, 1964, the investigation was expanded to include 1961 and 1963. (Stipulation filed in connection with defendant's lower court pre-trial Motion for Return of Evidence and its Suppression (VIII: 148-82), hereinafter designated "Stipulation".)

On February 2, 1965 in Greeley, Colorado, defendant was interviewed by Mr. Jacques V. Merrifield, Special Agent, Intelligence Division, in the presence of Revenue Agent Green. No one else was present. The transcript of the tape recorded interview, hereinafter designated "Q & A", was appended as Exhibit 2 to defendant's lower court pre-trial motion to suppress. (VIII: 156-82)

Special Agent Merrifield apprised defendant that he had been requested to appear "to answer questions and furnish data concerning [his] income tax liabilities to the United States for the years 1961, 1962 and 1963." (VIII: 156) No mention was made, and defendant had no knowledge, of the fact that 1964 was also to be included. At the time of the Q & A, defendant's 1964 return had not yet been filed. (IX: 298) Nor, at that time, had 1964 been included in the investigation. (See Exhibit 4(b) to the Stipulation)

Merrifield talked with defendant about matters generally pertaining to defendant's background. Thereafter, Merrifield said: (VIII: 159):

> "Well, Mr. Merrick, it becomes my duty to advise you that under the Constitution of the United States you have the right to refuse to answer any questions or to make any statement which may tend to incriminate you under the laws of the United States and to inform you that anything you say or any evidence which you produce at this hearing may be used against you in any proceeding, criminal or otherwise, which may hereafter be undertaken by the United States. Do you fully understand what I have just said?"

Indicating ambivalence, confusion, or both, defendant responded (VIII: 159):

> "Yes, that's what I don't like. I understand that before but I suppose you will ask a few questions and then if I think I had better wait until Mr. Dinner talks to me or accompanies me—however he wants to do it, I think that would be better, wouldn't it?"

To which Merrifield replied (VIII: 160):

> "That is certainly up to you. I mean you do have these rights. We cannot and will not violate them, and it's up to you whether we proceed any further."

Still unsure of himself or of exactly what "these rights" were, in particular, the right to counsel, defendant asked (VIII: 160):

> "Well, do you want to go ahead and ask some questions and see how I feel, is that cricket or what, and then we set up a date for him to be with us, is that the . . . I'm so dumb I don't even know. Does your lawyer come with you or what in a case like this."

To which Merrifield replied (VIII: 160):

> "A lawyer may accompany you, he should have your power of attorney to talk for you and answer any questions for you, HE SHOULD BE, UH, and I would like to know whether he is an enrolled attorney or not?" [The capitalized words were omitted from the original transcription of the Q & A. Their inclusion and accuracy were stipulated to (VIII: 149)].

Defendant (VIII: 160):

> "Well, he certainly is, what does what mean?"

Merrifield (VIII: 160):

> "I think that he would know, I mean I would like to find if he has a treasury card. If you'd ask him . . . I mean we can cover that ground when and if he comes."

Whereupon the interview proceeded with defendant in a state of confusion and uncertainty.

At a later point during the Q & A, Merrifield, apparently conscious of this state of confusion and uncertainty, made specific mention of it (VIII: 172):

> "I hope you haven't forgotten, Mr. Merrick, the admonition that we gave at the beginning of this interview and your hesitancy to proceed at first, I want you to reconsider on anything that you have said when anything that any of these additional questions that I will ask you. (*sic.*)"

He specifically noted defendant's "hesitancy to proceed". Notwithstanding this renewed "admonition", defendant remained uneasy, confused and uninformed (VIII: 172):

> "I might come to a point pretty soon that I think I had better not answer before I talk to my lawyer, isn't that normal, I mean . . ."

He still wasn't sure of what his rights were. Merrifield's response was (VIII: 172):

> "I just wanted you to be cognizant . . . I mean I am, and not lead into something that you know you shouldn't do."

Clearly not "cognizant," defendant replied (VIII: 172):

> "I hope I've not, let's put it that way."

Whereupon, the Q & A continued to its conclusion, 2 hours and 10 minutes after it had begun.

The foregoing quotations from Merrifield and defendant constitute the only statements in the Q & A pertaining to, or susceptible of being construed as, a "warning" or waiver of constitutional rights.

Thirty-five minutes after termination of the Q & A, Merrifield served a summons on E. L. Hanks, defendant's CPA in Greeley, Colorado. (Exhibit 5 to Stipulation, VIII: 270; see also II: 62-64) The summons required Hanks to produce, for 1961, 1962 and 1963:

> All income tax workpapers, letters and memoranda in your possession relating to the taxpayers [defendant and his wife] and/or Lee Dog Food and/or Lee Bi-Products (a sole proprietorship), Greeley, Colorado, with other offices in Fort Collins and Fort Morgan, Colorado; and any other transactions or businesses in which the taxpayers may have or had a proprietary interest.

In connection with service of the summons, Hanks testified at trial as follows (VII: 72-74):

> Q. Mr. Hanks, when the agents came to your office that day in February, did they tell you they had just come from an interview with the defendant?
>
> A. Well, that I am not clear of that. I am not really certain about that. I don't remember that they did.
>
> • • •
>
> Q. Mr. Hanks, on this day in February of 1965, what did you understand was the obligation of Mr. Merrick as to his records to be turned over to the agents as a result of the summons?
>
> A. I believe he had to turn them over.
>
> Q. That he had to turn them over?
>
> A. Yes.
>
> Q. All right. Did you have any conversations with Mr. Merrick, regarding his turning over records and cooperating with the Internal Revenue Agents after February the 2nd?
>
> A. Yes.
>
> Q. And in those conversations is it true that you told him he might as well turn them over, they could get them anyhow?
>
> A. Yes.
>
> Q. Had you had any occasion in your experience as a CPA, of being served with a summons in a criminal case?
>
> A. No.

At the bottom of the summons appears the following (VIII: 270):

> Failure to comply with this summons will render you liable to proceedings in the District Court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Then, defense counsel inquired (II: 74)

> Q. Mr. Hanks, at any time did you advise the defendant that he had the Constitutional right not to turn over his records to the Government?
>
> A. No.

At this point, counsel for the government conceded that Hanks, who is not an attorney, had no ". . . obligation to advise the defendant of his Constitutional rights," but rather, that ". . . the Government Agents had the [obligation to do so]." (II: 74)

The substance of Hanks' trial testimony, as well as all the foregoing from the Q & A, was before Judge Arraj (not the trial judge) by way of the Stipulation at the time he considered and denied the motion to suppress. (VIII: 148-82)

After receiving a "power of attorney" from defendant[6] (II: 64), Hanks obtained from defendant those records (VIII: 142) pertaining to all years, including 1964 (Pl. ex. 5; IX: 344-67), and turned them over to the agents on Feb. 8, 1965. (VIII: 151; II: 65, 66, 68, 69) Defendant would not have authorized the turning over of the records except for Hanks' advice that their production could be compelled. (VIII: 151)

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[6] After the summons was served on Hanks, Merrifield and Green met with him on Feb. 5, 1965, ". . . and discussed the records available and those we had previously requested from Merrick on Feb. 2, 1965." (Ex. 4 (b) to the Stipulation) Advised at this meeting that he would have to obtain a power of attorney from defendant in order to deal directly with the agents, Hanks did so on Feb. 8, 1965. (VIII: 151, Ex. 6 to the Stipulation; VIII: 271) The "power of attorney" does not contain a delegation to Hanks of the authority to waive defendant's constitutional rights, nor is there any delegation of authority to turn over records and documents.

On the same date the summons was served on Hanks, Joseph T. Woolridge, CPA, was served with a summons in Louisville, Kentucky. (Ex. 7 to the Stipulation; VIII: 152-53) The records obtained from defendant through Woolridge are itemized in Item 6 of Ex. 3 to the Stipulation. (VIII: 142, 153)

Agent Merrifield's trial testimony and stipulated testimony (II: 46-47; VIII: 150; Ex. 4(a) to the Stipulation) is also relevant to the issue of the adequacy of the warnings and as to whether there was a valid waiver by defendant, particularly as to 1964. It is clear that defendant was never warned of his rights as to 1964.[7]

As noted above, Judge Arraj, in ruling on the pre-trial motion to suppress, refused to exclude, as to the years 1961, 1962 and 1963, any of the evidence, oral or documentary, obtained from defendant or his accountants. The judge's order (VIII: 257-60) concluded ". . . that no violation of any of defendant's constitutional rights occurred . . ."

Judge Chilson presided at trial. When the question of suppression of evidence was raised at trial (II: 47, 75-79), he asked an Assistant U.S. Attorney for verification of the scope of the pre-trial motion, and was informed that Judge Arraj had ruled even as to 1964. (II: 77) Judge Chilson then overruled defendant's objection to admissibility of the documents pertaining to 1964 (II: 79), based upon his " . . . understanding as stated by the U. S. Attorney that Judge Arraj ruled on the admissibility of the

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[7] Merrifield stated that the only constitutional warnings given were referred to in Exhibit 2 (the Q & A set forth *supra*) and in Exhibit 4(a) (which makes no mention of 1964).

documents . . ." (II: 79) Moreover, earlier in the proceedings, co-counsel for the government had represented to the court that "the motion filed by the defense did cover the records for 1964, as well as the records for 1962 and 1963." (II: 48) This was a patent misunderstanding.

Instructions

Defendant requested certain instructions regarding knowledge of the contents of the returns, which were refused.[8] Instead, the court gave a wholly different in-

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[8] The evidence here shows that the defendant signed his return in blank. The mere signing of the return does not justify an inference that he had knowledge of the contents of such return, unless from all the evidence you believe beyond a reasonable doubt that he did in fact know the contents of such return. (VIII: 218)

You are instructed that evidence has been introduced that the defendant did not prepare the tax returns in question and that they were signed in blank and prepared for him by Joseph Woolridge, a person who held himself out as one qualified to prepare federal income tax returns for others. If you find from the evidence that the defendant provided the aforesaid Joseph Woolridge with all information which he had with relation to his taxable income and expenses during the years involved and that the defendant adopted, signed and filed the tax return as prepared or directed the same to be filed without having reason to believe that it was not correct, you will find the defendant not guilty.

If, on the other hand, you find beyond a reasonable doubt that the defendant knowingly did not provide full and complete information to Joseph Woolridge or that he knew that the information supplied to Joseph Woolridge was not correct and substantially understated the tax liability of the defendant, then you are not required to find the defendant not guilty simply because he did not prepare the tax return himself but rather had it prepared for him by another. (VIII: 233)

struction on the subject over defense objection.[9]

Defendant's requested instruction concerning circumstantial evidence and reasonable doubt was refused,[10] and the court gave a contrary instruction over objection.[11]

Defendant requested an instruction to the effect that the outcome of the criminal case had no bearing on defendant's civil tax liability, which was refused,[12] and no instruction on this issue was given.

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[9] Whenever the fact appears beyond a reasonable doubt from the evidence in the case that the accused signed his Tax Return, the jury may draw the inference and find that the accused had knowledge of the contents of the Return. (VII: 678)

[10] You are instructed that the defendant is presumed innocent until his guilt is established beyond a reasonable doubt. You may not find him guilty upon speculative theory or conjecture and if circumstantial evidence is relied upon such evidence must be scrutinized carefully. Such evidence must be clear, convincing and inconsistent with any reasonable hypothesis of innocence. (VII: 234)

[11] The law generally speaking makes no distinction between direct and circumstantial evidence. It requires only that the jury be convinced of the guilt of the defendant beyond a reasonable doubt from all the evidence in the case, both direct and circumstantial. (VII: 679)

[12] You are instructed that no matter what your verdict might be regarding the criminal counts of the indictment, the defendant will have to pay all taxes, interest and civil penalties which are in fact owed. The amount of the taxes, interest and civil penalties which are owed, if any, will be the subject of other proceedings, regardless of your verdict. Your sole duty is to determine whether the crimes as alleged in the indictment have in fact been committed. (VIII: 219)

REASONS FOR GRANTING THE WRIT

1. Defendant's constitutional rights to a speedy trial and due process of law were violated by the 7 and 8 year delay in prosecution; prejudice was demonstrated by the events which unfolded at trial.

Certiorari should be granted to review the Court of Appeals' decision so that this Court may clarify its recent decisions in *United States* v. *Marion*, ... U.S. ....., 30 L.Ed.2d 468, and *Barker* v. *Wingo*, ... U.S. ....., 33 L.Ed. 2d 101, in such a way as to assure that trial and appellate court will not misapply said decisions in derogation of the constitutional rights to a speedy trial and to due process of law, and to assure that these rights are secured to all criminal defendants.

Moreover, it is clear that defendant never had a meaningful hearing on the merits of his claim in the trial court. Such hearing is required. *Cf. Haines* v. *Kerner*, ... U.S. ....., 30 L.Ed.2d 652. When Judge Arraj heard and denied the motion to dismiss based on prosecutorial delay, it had not yet been established that the pertinent records of the Laurents Packing Co. had been burned. After this had been established, defendant attempted to obtain a hearing on the merits, but never succeeded in having a judge rule on the merits of his renewed motion.

The Court of Appeals perfunctorily found no actual prejudice due to the lengthy delay. We submit that, in the light of events which occurred at trial, actual prejudice to defendant has been demonstrated, and the Court of Appeals decision to the contrary is patently incorrect.

Prejudice to defendant was shown as follows:

1. The Bill of Particulars charges defendant with receiving proceeds from Laurents Packing Co. The government photostated and preserved the Laurents Packing Co. checks (XI: 872-73) claimed to have been received but not

reported by defendant. Those checks were very much in existence some eight years after 1963 and seven years after 1964. But the details of over $2,000,000 in purchases by Laurents Packing Co. in each of those years was lost during the delay.

2. Without the original records of Laurents Packing Co., defendant could not demonstrate that Laurents Packing Co. may have had, as a part of its more than $2,000,000 annual purchases, other transactions involving checks to cash and cash purchases which would have been reflected in the cash disbursements journal, or even other transactions with Columbine Boneless Beef Co. or Thrifty Meat Co.

3. Such evidence of similar transactions was essential to test the credibility, competency, memory and reliability of the government's circumstantial proof that the proceeds of the checks listed in the Bill of Particulars were in fact transactions involving defendant rather than some other person.

4. Such evidence of similar transactions was essential to lay a proper foundation to establish that there was a reasonable doubt as to whether defendant received the proceeds of any particular check.

5. As a result of the death of the bookkeeper, Mrs. Woertendyke, defendant was unable to present at trial her testimony regarding (a) the instructions given to her by defendant, (b) the degree and amount of supervision and control which defendant exercised over his bookkeeping operations, (c) whether defendant paid close attention to the daily business affairs of his business or instead delegated those responsibilities to others—all of which were relevant and material to the ultimate question of whether the requisite criminal intent did or did not exist.

6. The events of the trial clearly established, in the scope of *United States* v. *Marion*, 30 L.Ed.2d 468, 479, and

Barker v. *Wingo*, 33 L.Ed.2d 101, 118, that the memories of witnesses had dimmed during the period of delay. Specific examples of impaired memories are set forth below.[13]

7. Purely circumstantial evidence, very substantial passage of time between the alleged criminal events and the trial, the loss of the very records which could have made

[13] Examples of "dimmed memories"

Vol.	Page	Lines	Witness
III	224	3-7	Meyers
III	224	21-24	Meyers
III	227	5-7	Meyers
III	231	13	Meyers
III	242	21-24	Meyers
III	243	3	Meyers
III	245	14-18	Meyers
III	266	12-15	Shinn
III	282	9-11	Shinn
III	282	13-15	Shinn
III	282	17-19	Shinn
III	283	22-25	Shinn
III	284	11-12	Shinn
IV	314	15-16	Shinn
IV	315	15-20	Shinn
IV	317	1-25	Shinn
IV	322	12	Shinn
IV	330	1-11	Shinn
IV	337	1	Meyers
IV	342	24-25	Meyers
IV	343	1-3	Meyers
IV	369	23	Petrie
IV	382	25	Coker
IV	384	22	Lee Kane
IV	386	8-9	Lee Kane
IV	582	6	Deligianno
VI	583	2-6	Deligianno
VI	601	16	Roger Merrick
VI	601	24-25	Roger Merrick
VII	620	17-18	Float
VII	624	13-14	Float

the Bill of Particulars meaningful, and the death of the bookkeeper, cumulatively if not individually, have denied, and in any new trial would continue to deny, defendant any semblance of a fair trial.

In *United States* v. *Marion, supra,* this Court recognized that the right to a speedy trial adheres to a defendant at that point when he becomes an "accused" in a criminal case, and that such point may precede indictment, conceivably even dating back to arrest. In *Marion,* defendant claimed only that the real possibility of prejudice was inherent in the delay; there was no allegation or demonstration of actual prejudice. In *Barker* v. *Wingo, supra,* this Court affirmed because it determined that defendant did not actually want a speedy trial as evidenced by his tactics. However, the Court there noted that the right to a speedy trial is designed, among other things, to limit the possibility that the defense will be impaired due to delay. The Court noted that this interest is "the most serious," in that "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 33 L.Ed.2d at 118. The Court continued:

> "If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past." *Ibid.*

One of the reasons for the affirmance in that case was that prejudice was "minimal." *Id.* at 119. There was no claim that any witnesses died or that any evidence became unavailable, and the trial transcript indicated only "two very minor lapses of memory . . . which were in no way significant to the outcome." *Ibid.*

We submit that in the case at bar, where two witnesses died, business records of the company from which defendant allegedly received monetary proceeds which he failed to report as income had been destroyed, and there were many lapses of memory, actual prejudice as contemplated

by this Court's two recent pertinent decisions has more than adequately been demonstrated, particularly in light of the fact that the government's case was entirely circumstantial as to the crucial issues.

The Court of Appeals has misconstrued both this Court's recent speedy trial decisions.

First, the court held that the pertinent delay was between the filing of the complaint on April 11, 1969, and the start of the trial on March 22, 1971. This point in time is not compelled by either decision. However, we submit that even if this is the pertinent period, the demonstrated prejudice against defendant due to said delay violated his constitutional rights as delineated by *Marion* and *Barker* v. *Wingo, supra.* However, we further urge that in a criminal tax prosecution, the time from which delay must be calculated begins at a point earlier than the filing of the complaint, that is, at that point when the defendant's case is referred to the I.R.S. Intelligence Division, or, at the very latest, at the time when the defendant is first contacted by the IRS after such referral, for it is at that point in time that he is officially an "accused." *Cf. United States* v. *Lockyer,* 448 F.2d 417 (10 Cir.); *United States* v. *Dickerson,* 413 F.2d 1111 (7 Cir.), to the effect that one must be given full *Miranda* warnings as of that point when his case is referred to the Intelligence Division. See also *United States* v. *Mathis,* 391 U.S. 1. *United States* v. *Marion,* 30 L.Ed. 2d 468, at 476-77, clearly states that the right to a speedy trial is "applicable only after a person has been accused of a crime." The court rejected this argument based on its misinterpretation of *Marion,* and implying that its facts controlled the instant case. (App. 3) However, the offense involved in *Marion* was consumer fraud, not a tax offense.

Second, the court found no prejudice, partially based upon its conclusion that neither deceased witness would have aided defendant, and that the missing records would

not have been useful to defendant in any significant manner. We submit that without seer-like knowledge of what the unavailable evidence would have shown, it is erroneous to conclude, as did the Court of Appeals, that the unavailable evidence would not have aided the defense. *Cf. Dennis* v. *United States*, 384 U.S. 855, and similar cases, holding it improper for the court rather than defense counsel to determine whether given material is or may be of an impeaching or exculpatory nature. This Court in *Dennis* stated: "The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Id.* at 874-75. Similarly, the doctrine requiring that prospective witnesses be made available to all parties, see *Gregory* v. *United States*, 369 F.2d 185 (D.C. Cir.), would militate against the position of the Court of Appeals in this regard.

We submit that defendant was prejudiced due to the extreme delay in prosecuting his case, that the trial court never afforded defendant a meaningful hearing on the merits of his claim, and that the Court of Appeals applied erroneous standards in affirming his conviction.

Certiorari should be granted to clarify this Court's recent speedy trial decisions for the edification of the Nation's prosecutorial and judicial personnel and for the benefit of all criminal defendants whose constitutional rights are being jeopardized.

2. Defendant's Fourth, Fifth and Sixth Amendment rights were violated by the derivative use of defendant's statements and physical evidence given to IRS Agents by defendant and his accountants, where defendant had not been properly advised of his rights as to 1963, and had not been advised of his rights at all as to 1964.

Defendant was informed on September 4, 1964, that his 1962 return was to be examined. He was first interviewed on September 8, 1964, and his case was referred to the

Intelligence Division on April 25, 1964. In December, 1964, the investigation was expanded to include 1961 and 1963. (Stipulation) On February 2, 1965, defendant was interviewed by Agent Merrifield of the Intelligence Division in the presence of another agent. The transcript of the tape-recorded interview is set forth *supra* in the Statement of the Case, at pp. 11-13.

In affirming denial of defendant's motion to suppress, the Court of Appeals found that the warnings were adequate, and that defendant's statements at the interview and the subsequent delivery of the records were voluntary. (App. p. 7).

It is clear that defendant was advised only that 1961, 1962, and 1963 were involved in the investigation, and that he was never warned of his constitutional rights as to the 1964 offense. (VIII: 156; IX: 298; Ex. 4(b) to the Stipulation)

Constitutional warnings were clearly required. In tax fraud investigations, *Miranda* warnings are mandatory "at the inception of the first contact with the taxpayer following transfer of the case to the Intelligence Division." *United States* v. *Lockyer*, 448 F.2d 417, 422 (10 Cir.); *accord*, *United States* v. *Dickerson*, 413 F.2d 1111 (7 Cir.); *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill.); *United States* v. *Wainwright*, 284 F. Supp. 129 (D. Colo.).

Defendant's rights were violated by denial of his motion to suppress by admission of his business records into evidence.

First, the warnings given covering 1963 were inadequate. Defendant was never advised that if he could not afford counsel, counsel would be provided at no cost to him, then and there, before any further questioning. (VIII:

150, 159; II: 46-47; Ex. 4(a) to Stipulation) Such omission renders the warnings insufficient to satisfy minimal constitutional requirements. *Miranda* v. *Arizona,* 384 U.S. 694; *Atwell* v. *United States,* 398 F.2d 507 (5 Cir.); *Sullins* v. *United States,* 389 F.2d 985 (10 Cir.); *United States* v. *Fox,* 403 F.2d 97 (2 Cir.).

Moreover, he was never advised that the jeopardy to which answering and providing information might subject him extended to his actions *after* the questioning as well; the warnings were limited to "at this hearing." (VIII: 159) Thus, defendant was never advised of the consequences of his production of documents shortly after the hearing, or that he had a right not to produce any documents.

Second, even assuming *arguendo* that the warnings were adequate as to 1963, defendant never knowingly and intelligently waived his rights. "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." *Miranda* v. *Arizona,* 384 U.S. 436, 470. The fact that an accused proceeded to "cooperate" by giving information does not, in and of itself, constitute waiver. See *Sullins* v. *United States,* 389 F.2d 985 (10th Cir.). Moreover, it is obvious from the context of the Q & A (see pp. 11-13, *supra*) that defendant was not fully cognizant of his rights. There was even some question raised as to whether the attorney defendant said he intended to consult was "enrolled" for practice before the IRS. (XIII: 160) Under the circumstances as revealed by the transcript of the Q & A, defendant cannot be said to have waived his rights.

For waiver of a constitutional right to be effective, there must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U.S. 458, 464. Under such standard, waiver cannot be found from the record in the case at bar.

Third, defendant's production of the records through his accountants after the Q & A terminated was not voluntary, being based upon defendant's misunderstanding that their production could be compelled and that he had no right to refuse to produce them pursuant to the summons, which incorrect view by defendant was never corrected by any IRS personnel. The summons stated that failure to obey was punishable. (VIII: 270) He was never advised that he had a right not to produce the records; hence, their production and seizure could not be the consequence of a knowing and intelligent waiver of his Fourth and Fifth Amendment rights. *Johnson* v. *Zerbst, supra; cf. Schoepflin* v. *United States,* 391 F.2d 390, 398-99 (9 Cir.); *Cipres* v. *United States,* 343 F.2d 95, 97 (9 Cir.); *Bustamonte* v. *Schneckloth,* 448 F.2d 699 (9 Cir.).

Moreover, production and use of the records following the Q & A was the direct result of the statements made by defendant at the Q & A. Thus it is irrelevant to argue, as did the government below, that defendant's motion to suppress was properly denied since no statements made by him at the Q & A were introduced in evidence. See *Wong Sun* v. *United States,* 371 U.S. 471.

In summary:

(1) Defendant was not afforded constitutional warnings sufficient under *Miranda.* He was not told of his right to retained or appointed counsel during the questioning. He was informed that a lawyer would have to be an "enrolled

attorney" in order to represent him. Moreover, his confusion, ambivalence and lack of intelligent comprehension of his rights persisted throughout the entire interview. (See Q & A, *supra*, pp. 11-13).

(2) The warnings which were given, such as they were, were expressly limited to proceedings "at this hearing." They did not purport to continue thereafter, but were expressly limited to that particular point in time.

(3) Assuming that the warnings were sufficient, defendant's state of mind, as evidenced throughout the Q & A, was so confused that he did not approach possession of that kind of intelligent and knowledgeable comprehension of his rights prerequisite to a voluntary waiver. Moreover, his obvious ambivalence is so apparent that it leaves little doubt that his conduct at the Q & A was the effect of pressures of the interrogation setting, rather than the product of a free and voluntary choice.

(4) Defendant's lack of knowledge of his rights at the hearing was aggravated by the immediate service of summons demanding the turning over of records at the risk of punishment, and by the failure of IRS personnel ever to advise defendant that he had a right to refuse to produce the records. Clearly, their production was not voluntarily made as the result of an intelligent and knowing waiver.

(5) Defendant was never warned of his rights as to 1964.

The Court of Appeals' decision leaves IRS personnel free to infringe upon the Fourth, Fifth and Sixth Amendment rights of taxpayers under criminal investigation, and to coerce production of documents by summons under the guise that their production is mandatory. Moreover, it seriously limits and undermines the scope of *Miranda* as applied to criminal tax investigations.

Certiorari should be granted in order to clarify *Miranda's* applicability to criminal tax investigations and to relieve defendant from a conviction based upon improper use of evidence produced by him in violation of his constitutional rights.

3. Defendant was convicted on the basis of a conclusive presumption that one who signs his tax return knows its contents; the court refused to instruct the jury that one who signs a tax return in blank is held responsible for its contents and held knowledgeable thereof, where he has entrusted its preparation to one qualified to prepare federal tax returns for others, only if the evidence establishes that he did in fact know the contents of the return, or that he knowingly withheld from the preparer any available data as to his taxable income and expenses, or knowingly provided him with incorrect data. There is a conflict on this issue between the 10th and 7th Circuits.

The jury in this case was in effect instructed that one is blanketly responsible for, and held accountable for knowledge of, the contents of a tax return signed by him, even if signed in blank. The court instructed the jury, over objection, that:

> Whenever the fact appears beyond a reasonable doubt from the evidence in the case that the accused signed his Tax Return, the jury may draw the inference and find that the accused had knowledge of the contents of the Return. (VII: 678)

Defendant requested instructions advising the jury that if defendant signed his return in blank and had his return prepared by one qualified to prepare federal tax returns for others, he should be acquitted unless the evidence established that he had actual knowledge of the contents of

the return, or that he knowingly withheld available data or supplied incorrect data to the preparer of his return. (See instructions set forth, *supra,* p. 17, footnote 8). The court refused to give these instructions. (VIII: 218, 233)

The given instruction amounts to directing the jury to find defendant guilty if the return understated defendant's income and if defendant signed it; it amounts to a conclusive presumption of knowledge of the contents of the return from the fact that one has signed it. This is impermissible. *United States* v. *Bass,* 425 F.2d 161 (7 Cir.); *cf. United States* v. *Leary,* 395 U.S. 6.

In *United States* v. *Bass, supra,* the court held:

> "The language at the bottom of the return . . . is as follows:
>
> > I declare under penalties of perjury that I have examined this return (including accompanying schedules and statements) and to the best of my knowledge and belief it is true, correct and complete.
>
> In light of such statement, the signing of a blank return may be one element necessary to convict a taxpayer of perjury. However, it cannot be said that the effect of such statement is to attribute knowledge of the contents of the return to the taxpayer on the basis of his signature alone. In Lurdig v. United States, 179 F.2d 419, 421 (6th Cir. 1950), the court said that the taxpayer's signature has the effect of making the return his own, but knowledge of the contents must also be proved aside from the wilful intent to evade taxes. We do not hold that a taxpayer can sign a false return and escape liability by disclaiming actual knowledge of the contents. *See* Paschen v. United States, 70 F.2d 491, 499 (7 Cir. 1934) Rather, we conclude

> that *it is improper to charge a taxpayer with conclusive knowledge of the contents on the basis of the signature alone.* Knowledge may be inferred from the facts and circumstances of the case and certainly the signature at the bottom of the tax return is *prima facie* evidence that the signor knows the contents thereof. See United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965) *The court's instruction created a conclusive presumption and it was in error."* 425 F.2d at 163. (Emphasis added.)

The instruction held to be reversible error in *Bass* was identical to the instruction given in the case at bar. *Id.* at 162.

On the other hand, the Tenth Circuit in *Wainwright* v. *United States*, 413 F.2d 796 and 448 F.2d 987, has approved the precise instruction given in the case at bar.

Moreover, refusal to grant the requested instructions was tantamount to refusal to instruct the jury upon defendant's theory of the case, and thus was reversible error. *Perez* v. *United States*, 297 F.2d 12 (5 Cir.); *United States* v. *Von Roeder*, 435 F.2d 1004 (10 Cir.). Instructions similar to those tendered by the defense and refused were approved in *Bursten* v. *United States*, 395 F.2d 976 (5 Cir.).

Defendant's conviction was thus based upon an erroneous instruction, the effect of which was to direct a verdict of guilty upon proof that he signed a return which understated his income, without permitting the jury to consider the essential question whether, in the light of all the evidence—including whether defendant had his return prepared by another, whether he signed it in blank, and whether he made full disclosure of all pertinent data to the preparer—defendant did or did not actually have knowledge of the contents of the return.

Certiorari should be granted to resolve the conflict between the Tenth and Seventh Circuits concerning this important aspect of federal tax prosecutions, and to relieve defendant of the consequences of a conviction based upon such improper conclusive presumption. Moreover, this Court should reaffirm the right of a defendant in a criminal case to have the jury properly instructed as to his theory of the case.

4. Defendant's right to a fair trial was violated by application of the rule followed by the Tenth Circuit that circumstantial evidence need not exclude every reasonable hypothesis other than that of guilt; this rule may not continue to stand in the light of In Re Winship, 397 U.S. 358.

Defendant requested an instruction that where circumstantial evidence is involved, to support a conviction the evidence must be inconsistent with any reasonable hypothesis of innocence. (See p. 18, *supra*, footnote 10.) The court refused this instruction. (VII: 234). Instead, the court gave over objection an instruction drawing no distinction between direct and circumstantial proof. (See p. 18 *supra*, footnote 11; VII: 679)

We recognize that prior law approved such an instruction as that given by the trial court. *Holland* v. *United States*, 348 U.S. 121. However, we urge that this instruction is no longer viable since this Court's decision of *In Re Winship*, 397 U.S. 358, holding that proof beyond a reasonable doubt to sustain a conviction is a requirement of due process of law.

The evidence in the case at bar was wholly circumstantial as to defendant's having received unreported income. See Statement of the Case, pp. 6-8, *supra*.

We submit that the instruction given in this case, considered in the light of the highly tenuous and circumstantial nature of the evidence against defendant, authorized the jury to convict him upon some amount of evidence less than proof beyond a reasonable doubt.

Winship should be held to require that in a case where the government's case substantially depends upon circumstantial evidence, an instruction such as that requested by defendant must be given in order to safeguard defendant's right not to be convicted upon evidence of guilt less than beyond a reasonable doubt, and for this purpose certiorari should be granted.

5. The court erred in refusing to instruct the jury that, whatever the outcome of the criminal case, the government has recourse to a civil action to collect unpaid taxes, interest and penalties. There is conflict among federal courts on this issue.

The court refused defendant's tendered instruction advising the jury that even if they acquitted defendant, the government would still be able to collect any taxes, interest and penalties owed by defendant. (See p. 18 *supra*, footnote 12; VIII: 219)

This refusal creates a conflict in instructions being given in the District of Colorado. See Appendix filed in *United States* v. *Wainwright*, Docket No. 88-68, at 533 (D. Colo. Judge Arraj), where an instruction such as that refused in the case at bar was given.

Such an instruction has also been given in the Western District of New York. *United States* v. *Rossi*, 66-2 U.S.T.C. ¶9649, 18 AFTR 2d 5296.

The Third Circuit recently recognized the importance of preventing misconceptions in the mind of a civil jury regarding tax liabilities which are collateral to the subject being decided by the jury. In *Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245, 1251 (3d Cir.), the court found that the jury should be instructed that a personal injury award would not be subject to federal income taxes, and that the jury should not add or subtract taxes in fixing the amount of any damages.

It is even more important in a criminal case to guard against a possible misconception that taxes, interest and civil penalties may be precluded by an acquittal. In a close case a jury may well be led to convict rather than to acquit in order not to let the defendant completely "get away" without paying taxes, if they do not realize that the civil option is open to the government regardless of the verdict in the criminal case.

There is a conflict among federal trial courts concerning whether the jury in a criminal tax case should be instructed as requested by defendant in the case at bar. Certiorari should be granted, and the conflict should be resolved in favor of giving such instruction so that no verdict will be based upon the jury's misconception.

Conclusion

For the above and foregoing reasons we respectfully urge the Court to grant this Petition for Certiorari to review the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLYN JAFFE
CONSTANTINE XINOS
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1972

No. 71-1460

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEE W. MERRICK,

Defendant-Appellant.

Appeal from the United States District Court for the District of Colorado
(D.C. No. 70-CR-242)

Before BREITENSTEIN, SETH, and MCWILLIAMS, *Circuit Judges.*

BREITENSTEIN, *Circuit Judge.*

A jury found defendant-appellant guilty of Counts II and IV of an indictment charging evasion of federal income taxes for the years 1963 and 1964 in violation of 26 U.S.C. § 7201. He appeals from concurrent sentences of one year on Count II and 18 months on Count IV.

The charges were based on failure to report specific items of income received during the years in question. Defendant owned and operated an animal by-products plant near Greeley, Colorado. The plant processed dead and

"downer" animals. The principal product was boneless beef used in pet foods. In 1963-4, defendant sold quantities of boneless beef to Laurents Packing Company, a sausage maker in Fort Wayne, Indiana. Defendant insisted that all payments by Laurents be in cash. The arrangement was that Laurents would issue a check, have it cashed, and give the proceeds to the person who delivered the meat. Defendant did not report the sums so received in his income tax returns.

The first claim is that the delay between the commission of the offenses in 1963 and 1964 and the trial in 1971 denied defendant his Sixth Amendment right to a speedy trial and his Fifth Amendment right to due process. The investigation of defendant's tax returns was referred to the Intelligence Division of the Internal Revenue Service in 1963 and an IRS agent first interviewed defendant in 1965.

Defendant was first charged in a complaint filed April 11, 1969. A preliminary hearing was held four days later. He was bound over for trial and his bond was continued. An indictment was returned on December 4, 1969, and later dismissed for technical reasons. A second indictment charging the same offenses was returned October 6, 1970. Thereafter, defendant filed 14 motions covering a wide range of legal issues and including a November 19, 1970, motion to dismiss for delay in prosecution. The record does not sustain defendant's claim that he was denied a meaningful hearing on any of these motions. Defendant made no request at any time for a speedy trial. The jury trial was held on March 22-26, 1971.

In United States v. Marion, 404 U.S. 307, 313, the Supreme Court said that the Sixth Amendment speedy trial provision "has no application until the putative defen-

dant in some way becomes an 'accused.'" Defendant in the case at bar became an accused when the April 11, 1969, complaint was filed. We are not impressed with the argument that in an income tax case the accusatorial stage begins when the investigation is focused on the accused by referral of the case to the Intelligence Division. In Marion, business records were delivered to the United States Attorney's office and defendant was interviewed in the summer of 1968. 404 U.S. at 309. The indictment was returned in April, 1970. Ibid. On these facts the Court held that the speedy trial provision was not engaged until indictment. Accordingly, we are concerned with what occurred after the filing of the complaint.

In Barker v. Wingo, ... U.S. ....., 40 LW 4840, the Court considered the speedy trial provision in its application to a murder conviction in a trial held more than five years after the arrest of the accused and found no constitutional deprivation. In so doing, the Court approved a balancing test in which the conduct of both prosecution and accused is weighed on an ad hoc basis. Although not excluding other factors, the Court identified four as pertinent. They are: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." ..... U.S. at ....., 40 LW at 4845.

The pertinent Sixth Amendment delay was between the filing of the complaint on April 11, 1969, and the start of the trial on March 22, 1971. The December 4, 1969, indictment was dismissed on June 9, 1970, on motion of the United States Attorney because of violation of grand jury secrecy. Defense counsel was present at the presentation of the motion to dismiss. Among other things he said that it would be unfair to continue the personal recognizance bond if the indictment was dismissed. The trial

court agreed. The breach of grand jury secrecy required that the government await the impaneling of a new grand jury. The second indictment was returned on October 6, 1970. A bench warrant was issued and defendant released on an unsecured bond. Various defense motions were filed on November 19, and heard and decided on November 25. Supplemental motions were filed and decided in March, 1971.

Thus we have a total delay of less than two years, a reasonable explanation of the necessity for reindictment, a defendant who at all times was released on an unsecured bond, a prompt disposition of defense motions, and no request by defendant for trial. We are left with the claim of prejudice to the defendant. This involves both Fifth and Sixth Amendment rights. See Marion, 404 U.S. at 325-326, and Barker, ... U.S. at ....., 40 LW at 4847.

Marion suggests two criteria for determination of whether due process has been violated by delay in prosecution. They are whether the delay "caused substantial prejudice to the appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." 404 U.S. at 324. The record contains nothing which suggests that the government delayed to secure tactical advantage. The question is whether defendant had a fair trial.

The first claim of prejudice is based on the destruction in 1968 and unavailability of the records of the Laurents Company, the purchaser of the boneless beef diverted from pet food to sausage production. The two men who kept the records testified as government witnesses and were subject to cross-examination by defense counsel. The claim is that the missing records could have been used to test the

reliability and credibility of their testimony. Nothing suggests that they would have helped the defense otherwise. The defense made no effort to rebut the testimony of the Laurents' employees.

Reliance is also had on the unavailability of two witnesses because of death. Both were prospective government witnesses. One, Mrs. Woertendyke, was defendant's bookkeeper and before her death gave an affidavit which was made available to defense counsel, who did not take advantage of the principle recognized in United States v. Brown, 10 Cir., 411 F.2d 1135, 1137, by the offer of the affidavit into evidence. The other, a Mr. Reuter, died on April 21, 1964, after a long illness. We find nothing to show that either would have given any specific exculpatory testimony favoring defendant. Finally, we have the claim that memories had dimmed. This relates basically to the testimony of the Laurents' employees. Their uncertainty as to various details hurt the government, not the defendant. Defense counsel were furnished with the affidavits which these witnesses had given the government and with their grand jury testimony. The record does not reveal the loss to the defendant of any exculpatory evidence. The charged offenses arose from concealment and nondisclosure, which made difficult the government's investigation and which minimize the claim of prejudice from delay. Cf. Nickens v. United States, D.C. Cir., 323 F.2d 808, 810 n. 2, cert. denied 379 U.S. 905. We are convinced that defendant had a fair trial and was deprived of no Fifth or Sixth Amendment rights.

After a hearing the trial court denied defendant's motion to suppress certain evidence. He claims that an IRS agent failed to give him an adequate Miranda warning

before his first interview. The trial court held that the warning was adequate and that defendant voluntarily waived his rights. We agree.

The differences, if any there be, between Hensley v. United States, 10 Cir., 406 F.2d 481, 484, and United States v. Lockyer, 10 Cir., 448 F.2d 417, 422, need not be resolved here. The interview was the first between an agent and the defendant after the case was referred to the Intelligence Division. Defendant was not in custody. The agent told him that he was the subject of a criminal investigation, that he had a right to consult and appear with a lawyer, that anything he said could be used against him in a later prosecution, and that he need not answer questions put to him. Nothing more is required by United States v. Dickerson, 7 Cir., 413 F.2d 1111, upon which defendant relies heavily. The efforts of defense counsel to persuade us that defendant was confused and did not understand his rights are not impressive. Defendant's statements during the interview indicated an understanding of his rights and he himself terminated the interview. The contention that the warning was defective because the agent did not tell him that he was under investigation for the year 1964 has no merit. He was told that he was under investigation for criminal offenses. The claim that the word "evidence" as used in the warning did not encompass books and records is frivolous.

Several days after the interview defendant's accountant delivered to an IRS agent certain books and records of defendant. He sought to suppress the use of these on the ground that the accountant misinformed him that the IRS could compel their production. The effort to blame the accountant is not persuasive. In his interview with the agent, defendant said: "I would have nothing against giving them

[the records] to you if I got them." We are convinced that the Miranda warning was adequate, that the statements made in the interview and the delivery of the records were voluntary and that the motion to suppress was properly denied.

Defendant attacks the sufficiency of the evidence. The government sought to establish tax evasion by the specific items method. The requires proof of specific items of income which were omitted from income tax returns. See Swallow v. United States, 10 Cir., 307 F.2d 81, 82, cert. denied 371 U.S. 950. The roots of the offense lie in concealment and nondisclosure. In judging the sufficiency of the evidence, it must be viewed in the light most favorable to the prosecution and the verdict upheld if there is sufficient direct and circumstantial evidence, together with the inferences reasonably drawn therefrom, to support the verdict. United States v. Ramsdell, 10 Cir., 450 F.2d 130, 133.

The defendant was the owner-operator of a meat by-products plant near Greeley, Colorado. Meat from dead or "downer" cattle was primarily sold to pet food companies which would haul the meat, packaged in containers labeled "inedible—for pet food only," from defendant's plant in the purchaser's trucks. In 1963, the plant manager of Laurents met defendant and discussed the purchase of frozen boneless beef. Defendant insisted that all payments for the meat be made in cash. This was contrary to Laurents' usual business procedures. Sales of the meat were arranged by defendant, either personally or by telephone, with Laurents. The meat came frozen in unmarked 50-pound cartons. Defendant specifically ordered that the manufacturer of the boxes leave them unmarked. The meat was usually delivered in U-haul or unmarked trucks bearing Colorado license plates. On two occasions a tractor-trailer rig was rented for the meat delivery and each time defendant paid part of the truck rental to the driver.

Payment was by check drawn on Laurents' account and payable to cash or a fictitious payee. The plant manager or the bookkeeper would accompany the deliverer of the meat to a local bank where the check would be cashed and the proceeds given to defendant on at least one occasion, and at various times to Garth Merrick or Don Kane who had delivered the meat. Garth Merrick was the son of the defendant and Don Kane was defendant's son-in-law. Both were at various times employed by defendant.

Six checks representing 1963 transactions varied in amount from $3,400 to $3,700. Sixteen checks representing 1964 transactions varied in amount from $1,000 to $13,200. The proceeds were not deposited in defendant's business accounts, shown on defendant's business records, or reported on defendant's federal income tax returns. The additional tax liability was $9,135 in 1963 and $48,541 in 1964.

The government relied on circumstantial evidence and reasonable inferences to be drawn therefrom. In line with Holland v. United States, 348 U.S. 121, 139, the Tenth Circuit is committed to the rule that circumstantial evidence need not exclude every reasonable hypothesis other than that of guilt. See Golubin v. United States, 10 Cir., 393 F.2d 590, 592, cert. denied 393 U.S. 831. Defense counsel argue that this rule is no longer viable because of In re Winship, 397 U.S. 358. In Winship the Court held that due process required proof beyond a reasonable doubt in all proceedings against a juvenile involving a criminal offense. We see no conflict between Winship and Holland. Holland states that the government must "prove every element of the offense beyond a reasonable doubt." 348 U.S. at 138. We decline to review our decisions which have followed Holland. The trial court properly instructed

the jury on both reasonable doubt and circumstantial evidence. The jury found defendant guilty. Substantial evidence and reasonable inferences therefrom sustain those verdicts and we will not disturb them.

The tax returns for the years in question were filed in Louisville, Kentucky. Copies authenticated by the IRS District Director in Denver, Colorado, were received in evidence. The Director certified that each copy is a true copy of the identified return "on file in this office." This is enough to satisfy the requirements of 26 U.S.C. § 7513 (c), 28 U.S.C. § 1733(b), Rule 27, F.R.Crim.P., and Rule 44(a)(1), F.R.Civ.P. See also Hollingsworth v. United States, 10 Cir., 321 F.2d 342, 352. Defendant does not dispute the truth or accuracy of the authenticated copies. They were properly received in evidence.

The trial court's instruction on presumption of knowledge of contents of tax returns conforms with our decision in United States v. Wainwright, 10 Cir., 413 F.2d 796, 802, cert. denied 396 U.S. 1018. The trial court refused to instruct the jury that a civil case might be brought against defendant to recover unpaid taxes, interest and penalties. We see no relevance in such an instruction. The remaining objections to the instructions deserve no mention. Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-405

LEE W. MERRICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1972, and a petition for rehearing was denied on August 25, 1972. The petition for a writ of certiorari was filed on September 9, 1972. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's rights under the speedy trial provision of the Sixth Amendment or the due process clause of the Fifth Amendment were violated on the facts of this case.

2. Whether petitioner was properly advised of his Fifth Amendment rights by an investigating special agent of the Internal Revenue Service.

3. Whether it was error to instruct the jury that if it found beyond a reasonable doubt that petitioner had signed his tax return it could infer that he knew of the contents of the return.

4. Whether it was error to refuse to instruct the jury that the government's evidence must be inconsistent with any reasonable hypothesis of innocence.

5. Whether it was error to refuse to instruct the jury that, even if petitioner were acquitted, the government would still be able to collect the unpaid taxes, interest and penalties by instituting a civil action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States and of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201, are set forth at Pet. 4.

STATEMENT OF THE CASE

Petitioner, after a jury trial in the United States District Court for the District of Colorado, was convicted of willfully attempting to evade personal income taxes for 1963 and 1964, in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201. He was sentenced to concurrent terms of imprisonment for one year on the 1963 count and for eighteen months on the 1964 count (VIII-R. 267).[1]

Petitioner operated plants in Colorado and Kentucky which purchased, processed, and sold products derived from animal carcasses (IV-R. 373, 387, 405). Most of these products were sold to manufacturers of pet food who paid by check (III-R. 183; IV-R. 369, 374, 378). Such checks were deposited to business bank accounts and were properly reflected in petitioner's records and reported on his tax returns (II-R. 84, 93; III-R. 184, 189).

The evidence also established, however, that some of petitioner's products were sold from the Colorado plant to an Indiana sausage manufacturer, Laurents Packing Company (IV-R. 367, 369, 373, 375, 395). Petitioner personally arranged with Laurents for each such sale (III-R. 218-220, 242-243, 256-257; IV-R. 307-310). Petitioner insisted that Laurents pay him in cash, which Laurents agreed to do even

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[1] References to I-R through XI-R are to the eleven volumes of the original record on appeal; references to I-Supp. R. through III-Supp. R. are to the supplemental record on appeal; references to I-2d Supp. R. through IV-2d Supp. R. are to the second supplemental record on appeal.

though that method of payment was contrary to its normal business procedures (III-R. 227, 266; IV-R. 310, 325, 331, 336). The payments were made to petitioner, or at times to his son or son-in-law, with cash obtained by Laurents' employees by cashing checks made payable to cash or to fictitious persons (III-R. 222, 228-231, 260-266; XI-R. 872-873). None of the proceeds of the sales to Laurents were deposited to petitioner's business bank accounts, reflected in petitioner's records, or reported on his tax returns (II-R. 87, 93, 105; IX-R. 284, 298, 352-367, 460-463; XI-R. 874-884). The omission of these items from petitioner's tax returns resulted in underpayments in income tax in the amounts of $9,135 and $48,541 for the years 1963 and 1964, respectively (VI-R. 557-559).

Petitioner's accountant in Colorado prepared state income tax returns from monthly summaries of sales; he discussed these returns with petitioner but was not informed of the sales to Laurents (II-R. 80, 85-87). The Colorado accountant mailed copies of the state tax returns to petitioner's Kentucky accountant, who prepared petitioner's federal income tax returns (II-R. 87). The Kentucky accountant was not advised by petitioner of the sales to Laurents either (II-R. 127, 134).

The tax investigation began in 1964, when petitioner's 1962 return was assigned to a revenue agent for examination. This agent interviewed petitioner and the case was thereafter assigned to a special agent of the Intelligence Division who interviewed

petitioner in February 1965 and warned him that it was his right not to incriminate himself, that his statements might be used against him in criminal or other proceedings, and that he was entitled to be accompanied by his attorney (VIII-R. 159-160). The special agent's investigation was discontinued in March 1966 but was reopened in February 1967 (VIII-R. 11). A criminal complaint was filed by the government on April 11, 1969 and an indictment was returned on December 4, 1969 (VIII-R. 31; IV-2d Supp. R. 1-5). This indictment was dismissed on June 9, 1970, on motion of the government because of a breach of grand jury secrecy; a second indictment was returned on October 6, 1970 (Pet. App. 3-4). After fourteen motions had been filed by petitioner, including a motion to dismiss the indictment for delay in prosecution, the case was tried in March 1971. No motion demanding a speedy trial was filed by petitioner (Pet. App. 2).

Prior to the trial, two prospective government witnesses died. One was petitioner's bookkeeper, Mrs. Woertendyke, whose affidavit had been furnished to petitioner's counsel. The second was a truck driver who died in 1964 before petitioner was even interviewed by the special agent (VI-R. 588). The general business records of the Laurents Packing Company were destroyed in 1968, but the records relating to Laurents' purchases from petitioner had previously been secured by the government in the course of its investigation (VIII-R. 145-147). The pretrial statements given by Laurents' employees to the revenue agents during their investigation, and the

agents' reports of their investigation, were furnished to petitioner's counsel at trial (Pet. App. 5).

The court of appeals affirmed petitioner's convictions in a comprehensive opinion addressed to all the issues petitioner seeks to raise in this Court.

ARGUMENT

1. Petitioner's contention (Pet. 19-24) that the pretrial delay violated his rights to due process and a speedy trial is fully answered in the opinion of the court of appeals (Pet. App. 2-5), on which we rely.

2. Petitioner's contention (Pet. 24-29) that he was not properly advised of his Fifth Amendment rights is soundly rejected in the opinion of the court of appeals (Pet. App. 5-7). We add (1) that petitioner's suggestion that he should have been warned of his rights as to the 1964 offense at his first meeting with the special agent is without merit, for at the time of that meeting petitioner had not yet even filed his 1964 return and in any event petitioner was warned that the evidence he supplied could be used in any criminal proceeding (Pet. 11); (2) that it was unnecessary to advise petitioner of his right to appointed counsel, since he indicated that he already had a lawyer (*ibid.*); (3) that petitioner clearly indicated his willingness to respond to questioning (Pet. 12); (4) that it was unnecessary to advise petitioner of any rights in connection with a summons issued to his accountant (Pet. 13-15), but in any event the prior, repeated warnings read to petitioner (Pet. 11-13) gave him ample notice of his rights with

respect to any evidence he might produce; (5) that the interviews long predated the prospective requirements of *Miranda* v. *Arizona*, 384 U.S. 436; and (6) that this case involves no conflict among the courts of appeals on the Fifth Amendment issues raised by petitioner.

3. There is no foundation for petitioner's contention (Pet. 29-32) that he "was convicted on the basis of a conclusive presumption that one who signs his tax return knows its contents." The district court's instruction, to which petitioner did not object,[2] was as follows (Pet. 29):

> Whenever the fact appears beyond a reasonable doubt from the evidence in the case that the accused signed his Tax Return, the jury may draw the inference and find that the accused had knowledge of the contents of the Return.

The instruction was proper. A signature on a tax return is "*prima facie* evidence that the signor knows the contents thereof." *United States* v. *Bass*, 425 F. 2d 161, 163 (C.A. 7). This *prima facie* evidence warrants a "permissive inference." *Webre Steib Co.* v. *Commissioner*, 324 U.S. 164, 169. The inference permitted by the instruction here was only permissive and not conclusive.

Although petitioner argues (Pet. 30) that the decision below is in conflict with *United States* v. *Bass*, *supra*, the language he quotes from the opinion of

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[2] Petitioner's undocumented statement (Pet. 29) that this instruction was given "over objection" is not correct and is not supported by the record (VII-R. 685).

the Court of Appeals for the Seventh Circuit in that case shows that the court was there concerned with unwarranted creation of a "conclusive presumption" attributing "conclusive knowledge" of the contents of the return. That was not the thrust or impact of the instruction given in this case. In any event, petitioner failed to object to the instruction at trial (VII-R. 685) and is therefore precluded from contesting it on appeal. Rule 30, Fed. R. Crim. P. And any error in the instruction was harmless for there was ample direct evidence of petitioner's intention to avoid disclosure of his transactions with Laurents.

4. Petitioner contends (Pet. 32-33) that the district court erred in refusing to give his tendered instruction (Pet. 18, n. 10) that he should be acquitted unless the circumstantial evidence was "inconsistent with any reasonable hypothesis of innocence." This argument was rejected in *Holland* v. *United States*, 348 U.S. 121, where this Court concluded (at 139-140) that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." The jury here was properly instructed on the standards for reasonable doubt (VII-R. 678-682) and no further instructions were required. Contrary to petitioner's claim, nothing this Court said in *In re Winship*, 397 U.S. 358, holding that proof beyond a reasonable doubt is among the essentials of due process, casts doubt on the continued vitality of *Holland*.

5. The district court correctly refused petitioner's request to instruct the jury that he "will have to

pay all taxes" which he owes "regardless of your verdict" (Pet. 18, n. 12). Even evidence of payment made after commission of the offenses could have been excluded. *Hayes* v. *United States*, 227 F. 2d 540, 543 (C.A. 10). *A fortiori*, it is irrelevant that petitioner might ultimately have to pay his civil tax liabilities. Although, as petitioner notes (Pet. 33-34), a few district courts do inform the jury that determination of civil liabilities may be made in other proceedings, there is no conflict among the courts of appeals on this issue.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

JOHN P. BURKE,
RICHARD B. BUHRMAN,
MAX D. WHEELER,
Attorneys.

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